No. 86-1125

Supreme Court, U.S.
FILED
FEB 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DAVID L. WILKINSON, Attorney General
of the State of Utah,

Appellant,

—v.—

CONNIE R. JONES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

MOTION TO AFFIRM

Of Counsel:

Dean Ringel
Susan Buckley
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)

George H. Shapiro
James P. Mercurio
Gerald E. Oberst, Jr.
ARENT, FOX, KINTNER,
PLOTKIN & KAHN

Donald B. Holbrook
LeGrand R. Curtis, Jr.
JONES, WALDO, HOLBROOK
& McDONOUGH

John S. Redpath, Jr.
Harold E. Akselrad
Faith Wender
HOME BOX OFFICE, INC.

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

*Counsel of Record for Appellee
Home Box Office, Inc.*

BRYAN L. McDOUGAL
Suite 712 Judge Building
Salt Lake City, Utah 84111
(801) 363-9500

*Counsel of Record for Appellees
Community Television of Utah
Inc., et al.*

PATRICIA A. O'RORKE
Suite 1250
50 South Main Street
Salt Lake City, Utah 84144
(801) 328-2200

*Counsel of Record for Appellees
Connie R. Jones, et al.*

February 20, 1987

QUESTIONS PRESENTED

1. Whether the Utah Cable Programming Decency Act is unconstitutionally vague for failing to set forth identifiable standards of conduct?

2. Whether the Utah Cable Programming Decency Act is an unconstitutional restriction of speech protected by the First Amendment?

3. Whether the Utah Cable Programming Decency Act is preempted by the Cable Communications Policy Act, 47 U.S.C. § 521 *et seq.* (Supp. III 1985)?

STATEMENT PURSUANT TO RULE 28.1

Pursuant to Rule 28.1 of the Rules of this Court, appellee Home Box Office, Inc. advises the Court that its parent corporation is Time, Inc. Neither Time, Inc. nor Home Box Office, Inc. has an interest in any subsidiary company or affiliated company whose stock is publicly held except for American Television and Communications, Inc.

Appellees Community Television of Utah, Inc., Community Cable of Utah, Inc., Utah Satellite, Inc., and Wasatch Community T.V., Inc. are all wholly-owned subsidiaries of Telecommunications, Inc. Community Television of Utah, Inc., Community Cable of Utah, Inc., Utah Satellite, Inc. and Wasatch Community T.V., Inc. have no subsidiaries. Telecommunications, Inc. has no interest in any subsidiary company whose stock is publicly held. Telecommunications, Inc. holds ten percent or more of the shares of the following companies: United Artists Communications, Inc., United Cable Television Corporation, Telecrafter Corporation and C.O.M.B., Co. *Cf.* 17 C.F.R. § 230.405.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Statement Pursuant to Rule 28.1	ii
Table of Authorities	iv
Statement of the Case	1
Summary of Argument	9
ARGUMENT	10
THE ISSUES DISPOSITIVE OF THIS CASE DO NOT WARRANT PLENARY CONSIDERATION BY THIS COURT	10
A. THE UTAH CABLE DECENCY ACT IS VAGUE AND STANDARDLESS ON ITS FACE	10
B. THE UTAH CABLE DECENCY ACT IS, IN ANY EVENT, AN UNCONSTITUTIONAL RESTRICTION OF SPEECH	15
1. The Statute Impermissibly Restricts Speech Protected by the First Amendment	15
2. The Courts Below Properly Resolved the Case on Cross-Motions for Summary Judgment	20
C. THE UTAH CABLE DECENCY ACT IS PREEMPTED BY THE CABLE COMMUNICATIONS POLICY ACT OF 1984	22
Conclusion	27

TABLE OF AUTHORITIES

Cases — PAGE

Ackerley Communications, Inc. v. *City of Salem*, 752 F.2d 1394 (9th Cir.), *cert. denied*, 105 S. Ct. 3503 (1985) 23n

American Booksellers Ass'n v. *Commonwealth of Virginia*, 792 F.2d 1261 (4th Cir. 1986) 23n

Babbitt v. *United Farm Workers National Union*, 442 U.S. 289 (1979) 21n

Baggett v. *Bullitt*, 377 U.S. 360 (1964) 10, 14

Bethel School District No. 403 v. *Fraser*, 106 S. Ct. 3159 (1986) 18

Board of Education v. *Pico*, 457 U.S. 853 (1982) 18

Bolger v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983) 18, 19

Butler v. *Michigan*, 352 U.S. 380 (1957) 18

Capital Cities Cable, Inc. v. *Crisp*, 467 U.S. 691 (1984) 6n, 13, 24

City of Renton v. *Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986) 18n

Community Television of Utah, Inc. v. *Roy City*, 555 F. Supp. 1164 (D. Utah 1982) 16-17

County of Allegheny v. *Frank Mashuda*, 360 U.S. 185 (1959) 21n-22n

Cruz v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985), *aff'g*, 571 F. Supp. 125 (S.D. Fla. 1983) 2n, 7n, 15, 15n, 17, 18, 19

Davis v. *Scherer*, 468 U.S. 183 (1984) 22n

Duncan v. *Poythress*, 777 F.2d 1508 (11th Cir. 1985), *cert. denied sub nom.*, 106 S. Ct. 1659 (1986) 23n

PAGE

FCC v. *Pacifica Foundation*, 438 U.S. 726 (1978) 9, 11, 14n, 15-20, 25, 26

Ginsberg v. *New York*, 390 U.S. 629 (1968) 18

Hensley v. *Eckerhart*, 461 U.S. 424 (1983) 22n

Home Box Office, Inc. v. *FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) 16

Home Box Office, Inc. v. *Wilkinson*, 531 F. Supp. 987 (D. Utah 1982) 2, 15n

Hynes v. *Mayor of Oradell*, 425 U.S. 610 (1976) 10

In re Kansas Congressional Districts Reapportionment Cases, 745 F.2d 610 (10th Cir. 1984)..... 23n

International Oceanic Enterprises, Inc. v. *Menton*, 614 F.2d 502 (5th Cir. 1980)..... 23n

Interstate Circuit, Inc. v. *City of Dallas*, 390 U.S. 676 (1968) 10n

Jenkins v. *Georgia*, 418 U.S. 153 (1974) 12

Kentucky v. *Graham*, 473 U.S. 159 (1985) 22n

Kusper v. *Pontikes*, 414 U.S. 51 (1973)..... 22n

Martin v. *Heckler*, 773 F.2d 1145 (11th Cir. 1985) 23n

Miller v. *California*, 413 U.S. 15 (1973) 7, 12, 12n, 15, 20

Milwe v. *Cavuoto*, 653 F.2d 80 (2d Cir. 1981) 23n

NAACP v. *Button*, 371 U.S. 415 (1963) 10n

Newman v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) 22n

New York v. *Ferber*, 458 U.S. 747 (1982) 21n

Piepenburg v. *Cutler*, 507 F. Supp. 1105 (D. Utah 1980), *aff'd*, 649 F.2d 783 (10th Cir. 1981) 12n

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969) 16

PAGE

Secretary of State v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984) 21n

Warth v. *Seldin*, 422 U.S. 490 (1975)..... 21n

Wheatley v. *Ford*, 679 F.2d 1037 (2d Cir. 1982)..... 23n

Young v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) 18n

Zarcone v. *Perry*, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979)..... 23n

Zwickler v. *Koota*, 389 U.S. 241 (1967)..... 22n

Constitutional Provisions

U.S. Const. Amend. I .....*passim*

U.S. Const. Art. III..... 21

Statutes

Cable Communications Policy Act of 1984

§§ 601 *et seq.*, 47 U.S.C. §§ 521 *et seq.* (Supp. III 1985) 7, 22-26
§ 601, 47 U.S.C. § 521 (Supp. III 1985) 7, 25
§ 611(e), 47 U.S.C. § 531(e) (Supp. III 1985)..... 24
§ 612(c), 47 U.S.C. § 532(c) (Supp. III 1985)..... 24
§ 624(d), 47 U.S.C. § 544(d) (Supp. III 1985) 19, 26n
§ 624(f), 47 U.S.C. § 544(f) (Supp. III 1985) 7, 23-24
§ 636(c), 47 U.S.C. § 556(c) (Supp. III 1985)..... 23
§ 638, 47 U.S.C. § 558 (Supp. III 1985) 8, 24, 25, 25n,

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982)..... 8, 22

Judicial Code, 28 U.S.C. § 1254(2) (1982) 22n

Utah Cable Television Programming Decency Act, Utah Code Ann. §§ 76-10-1701 *et seq.* (Supp. 1986) .....*passim*

PAGE

Utah Code Ann. § 67-5-1 (1978) 5n

Utah Code Ann. §§ 76-10-1201 *et seq.* (1978 & Supp. 1983) 12n

Other Authorities

Blakely and Eisgrau, *Regulatory Redux: The FCC's Shifting Approach Towards Obscenity and Indecency*, 4 Communications Lawyer 6 (Fall 1986) 26n

Certification of the Board of State Canvassers, December 14, 1984 ..... 3n

H.R. Rep. No. 934, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655 25-26

S. Rep. No. 1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5912 ..... 22n

Veto Letter from Governor Scott M. Matheson to Lt. Governor David S. Monson, re Utah Cable Television Programming Decency Act (March 30, 1983) 3-4, 12-14, 21n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1125

DAVID L. WILKINSON, Attorney General
of the State of Utah,

Appellant,

—v.—

CONNIE R. JONES, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE TENTH CIRCUIT

MOTION TO AFFIRM

Appellees move to affirm the decision below on the ground that the questions necessary to the disposition of this appeal are so unsubstantial as not to warrant this Court's plenary consideration.

STATEMENT OF THE CASE

This appeal arises out of a constitutional challenge to a 1983 Utah law restricting and penalizing, by civil forfeiture, those who distribute "indecent" (but not obscene) material on cable television. This is the fourth time Utah or one of its political subdivisions has enacted such restrictions. Each of the previous laws, like the present statute, has been determined to be unconstitutional.[1]

1 The United States Court of Appeals for the Eleventh Circuit has affirmed a district court's finding that a Miami ordinance, raising issues similar to those here, was unconstitutional. *Cruz* v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985). There are no contrary decisions.

In 1981, the Utah State Legislature passed a statute making it a crime for any cable operator in the State knowingly to distribute "indecent material" to its cable subscribers. That statute, which, among other things, banned any showing of nudity on cable television, was declared unconstitutional in *Home Box Office, Inc.* v. *Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

The State chose not to appeal the *Wilkinson* case. Shortly thereafter, two Utah cities passed ordinances which again sought to ban, within their jurisdictional limits, "indecent" speech on cable television. The first ordinance to reach the courts was declared unconstitutional in *Community Television of Utah, Inc.* v. *Roy City*, 555 F. Supp. 1164 (D. Utah 1982). No appeal was taken from that ruling. The other local ordinance was then repealed.

In 1983, the Utah Legislature passed a state-wide statute entitled the "Utah Cable Television Programming Decency Act", Utah Code Ann. §§ 76-10-1701 *et seq.* (Supp. 1986) [hereinafter "Cable Decency Act"]. The statute imposes a "forfeiture" of $1,000 ($10,000 for a second offense) on any person who, "as a continuing course of conduct," knowingly distributes "indecent material" within the State "over any cable television system or pay-for-viewing television programming." Indecent material is described as follows:

> "Indecent material" means a visual or verbal depiction, display, representation, dissemination, or verbal description of:
>
> (a) A human sexual or excretory organ or function; or
>
> (b) A state of undress so as to expose the human male or female genitals, public [*sic*] area, or buttocks, with less than a fully opaque covering, or showing of the female breast with less than a fully opaque covering of any portion below the top of the nipple; or

> (c) An ultimate sexual act, normal or perverted, actual or simulated; or
>
> (d) Masturbation
>
> which the average person applying contemporary community standards for cable television or pay-for-viewing television programming would find is presented in a patently offensive way for the time, place, manner and context in which the material is presented.

(J.S. App. 95a)[2] No standards are offered as to the meaning of any of these elements. Under its terms, the statute may be enforced by the Attorney General, any of the twenty-nine county attorneys and any of the more than 220 city attorneys.

After the Utah Legislature passed the Act, Governor Scott M. Matheson vetoed the legislation. In his veto message the Governor asked:

> What justification is there for curtailing the basic freedom of all cable TV subscribers in Utah to see what they choose?
>
> One answer is that some wish to prevent everyone from seeing that which they find personally offensive. This cannot justify the severe and constitutionally questionable restrictions which SB 309 would produce. In a free society, a majority does not have the right to police their neighbors' viewing preferences based on a standard no more substantial than mere distaste.[3]

---

2 References to "J.S. App. ____" are to appropriate pages of the Appendix to the Jurisdictional Statement. References to "J.S. ____" are to appropriate pages of the Jurisdictional Statement itself.

3 Veto Letter from Governor Scott M. Matheson to Lt. Governor David S. Monson, March 30, 1983 at 2-3 [hereinafter "Governor's Veto Message"]. In a subsequent referendum, the Utah electorate disapproved a criminal indecency statute. Certification of the Board of State Canvassers, December 14, 1984.

The broader constitutional questions aside, the Governor concluded that the definition of "indecent material" was "not the least bit predictable" and would have "the inevitable effect" of eliminating quality cable programming "simply because cable casters will not risk the uncertainties of the statute's enforcement and application." (Governor's Veto Message at 1-2) After receipt of the Governor's message, the Legislature overrode his veto.

This action was instituted by two groups of plaintiffs: individuals who subscribe to cable television in Utah on behalf of themselves and as representatives of a plaintiff class ("subscriber plaintiffs") and Utah cable system operators ("cable distributor plaintiffs") against the Attorney General individually and as representative of a class of the more than 250 officials authorized to enforce the statute. Shortly after the litigation was commenced, Home Box Office, Inc. ("HBO"), a provider of pay channel programming, moved to and was granted leave to intervene as a plaintiff. The Attorney General agreed not to enforce the statute pending resolution of the case. (*See* Opinion of the District Court, J.S. App. 43a.)

Seven months after the litigation in this case was commenced, the Attorney General issued a letter opinion offering his view as to the interpretation of several of the statutory terms. (J.S. App. 101a-115a) Acknowledging that he could not specifically define the statute's terminology "without functioning to some extent as a legislature" (J.S. App. 109a), the Attorney General advised that he would consider a "continuous course of conduct" under the statute to mean the showing of indecent material "three times within a ninety-day period." (J.S. App. 114a) Without identifying any specific statutory basis for the distinction, the Attorney General indicated that if "indecent material" were shown between midnight and seven a.m. he would not institute an enforcement action. (J.S. App. 113a) The Attorney General did not identify what material he would consider to be "patently offensive" for the "time, place, manner and context" shown, nor did he offer any guidelines

for making such determination. Under Utah law, the Attorney General's views are not binding on any of the more than 250 county and city attorneys authorized to enforce the statute.[4]

After discovery, plaintiffs moved, and the Attorney General cross-moved, for summary judgment. (Opinion of the District Court, J.S. App. 43a) The following facts, as summarized below, were, among others, agreed to by the parties and relied upon by the district court:

—A cable television system is a non-broadcast facility consisting of a system of privately-owned coaxial cables and associated signal generation, reception and control equipment that distributes television and other programming to subscribers. The cable distributor plaintiffs operate cable systems in the State of Utah and provide programming and other cable services to their subscribers by means of such privately-owned coaxial cables. (Undisputed Facts, Nos. 4, 9)[5]

—Cable television service, such as that provided by the cable distributor plaintiffs, is legally available only on the premises of persons who choose to subscribe to this service and agree to maintain a physical connection between their television receivers and a cable television system. Only television receivers that are physically connected to a cable television system are capable of receiving cable programming. (Undisputed Facts, Nos. 10, 11)

---

4 Under Utah Law, the Attorney General has no authority to bind or supervise city attorneys, nor the power to bind or to mandate the enforcement policies of county attorneys. *See* Utah Code Ann. § 67-5-1 (1978).

5 Citations to "Undisputed Facts" are to the "Statement of the Undisputed Facts" set forth in "Plaintiffs' Joint Memorandum in Support of Motion for Summary Judgment" filed with the district court. The undisputed facts set forth were agreed to by defendant below as reflected in "Defendants' Response to Plaintiffs' Statement of Undisputed Facts" set forth in "Defendants' Amended Memorandum in Opposition to Plaintiffs' Joint Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment" also filed with the district court.

—The primary cable service offered to subscribers by cable distributor plaintiffs and other cable systems is called basic cable service. The basic cable service includes retransmissions of local television broadcast channels plus additional television broadcast channels imported from distant cities (*e.g.*, WTBS-Atlanta, WGN-Chicago, KWGN-Denver), plus special just-for-cable channels (*e.g.*, ESPN, CNN, C-Span). (Undisputed Facts, No. 12)

—Plaintiff HBO is engaged in the business of acquiring rights to, and producing, programming that it distributes to local cable system operators, including the cable distributor plaintiffs. In contrast to basic cable service, programming such as that offered by HBO (which includes recently released, feature-length motion picture films, special entertainment programming and sports events) and other pay television program services (*e.g.*, Showtime, The Movie Channel and The Disney Channel) is offered by cable systems (including cable distributor plaintiffs) only to those subscribers who choose to subscribe to this specific programming and to pay a monthly subscription fee in addition to the fee paid for basic cable service. Such services are distributed by satellite throughout the nation. Each pay television program service offered by the cable distributor plaintiffs and other cable system operators is offered over a separate channel and cable subscribers may choose to receive or not to receive any or all of these program services. (Undisputed Facts, Nos. 6, 13-15)[6]

—Cable subscribers in Utah may obtain, at moderate cost, a key-operated "lockbox" that enables subscribers to render their sets incapable of receiving any particular channel. (Undisputed Facts, No. 17)[7]

---

6 *See generally Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984).

7 Information regarding the specific nature of cable programming is generally available to cable subscribers through such sources as daily news-

—Subscriber plaintiffs are adult residents of the State of Utah each of whom subscribes to a cable television service in his or her home in Utah, and each of whom receives and wishes to continue to receive cable programming which is not "obscene" but which might be considered "indecent material" as defined by the Utah Cable Decency Act. (Undisputed Facts, No. 5)[8]

—The definition of "indecent material" contained in the Utah Cable Decency Act encompasses expression that is not obscene under the test for obscenity articulated by this Court in *Miller* v. *California*, 413 U.S. 15 (1973). (Undisputed Facts, No. 2)

While the cross-motions for summary judgment in this case were *sub judice* before the district court, Congress passed the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521, *et seq.* (Supp. III 1985) ("Cable Policy Act"), the "first federal statute to establish a comprehensive regulatory scheme for the cable industry." (Opinion of the District Court, J.S. App. 46a-47a) *See generally* Cable Policy Act § 601, 47 U.S.C. § 521. Section 624(f) of the Cable Policy Act provides that no federal, state or local government may "impose requirements regarding the provision or *content* of cable services, except as *expressly provided* in this subchapter." 47 U.S.C. § 544(f) (emphasis added) In this regard the Cable Policy Act recognizes that

---

papers or TV Guide. In addition, pay cable services (including HBO) distribute their own programming guides that describe the content of the programming offered and alert potential viewers to programming that some may find offensive. *See Cruz* v. *Ferre*, *supra*, 755 F.2d at 1419.

8 By order entered on October 12, 1983 the district court certified a plaintiff class of all adult persons residing in the State of Utah who currently receive or wish to receive, or who currently do not receive and wish to receive, in their homes in Utah, communications which might fall within the Act's definition of "indecent material" but are not obscene. By order entered February 23, 1984, the district court certified a defendant class composed of all state, county and city officials empowered to enforce the statute.

states may continue to regulate unprotected speech ("libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws," Cable Policy Act § 638, 47 U.S.C. § 558), but that "cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or any other channel obtained under section 612 [providing for use by educational groups and entities other than cable operators]." *Id.*

On April 10, 1985, the district court (Anderson, J.) issued its 50-page opinion granting summary judgment to plaintiffs. The court held that the Utah Cable Decency Act was unconstitutionally vague and overbroad and that it was, as well, preempted by the Cable Policy Act. Shortly thereafter, plaintiffs moved for an award of attorneys' fees pursuant to 42 U.S.C. § 1988 (1982). Finding that plaintiffs were clearly the prevailing parties in the case and that no "special circumstances" existed so as to justify the denial of an award, the court granted plaintiffs' motion and included an award of reasonable attorneys' fees in the judgment. (J.S. App. 85a) The district court deferred determination of the exact amount to be awarded plaintiffs pending final resolution of any appeals in the case.

On appeal to the United States Court of Appeals for the Tenth Circuit, the Court affirmed the district court's judgment "on the basis of the reasons stated in the [district court's] opinion." (J.S. App. 5a) Judge Baldock filed a concurring opinion, concluding, *inter alia*, that the Utah Cable Decency Act was unconstitutionally vague and overbroad as drafted. (J.S. App. 39a-40a)

SUMMARY OF ARGUMENT

While appellant urges that this case calls upon the Court to determine "whether the First Amendment denies government any power" to restrict the public dissemination of "indecent" material on cable television and whether a "nuisance rationale," as articulated in *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 744 (1978), may support such legislation (J.S. (i)), the statute at issue and the judgment below simply do not require or justify consideration of those questions. To be sure, the courts below, like every other court that has considered the issue, concluded that the *Pacifica* decision, forged in the context of Federal Communications Commission ("FCC") review of programs presented by a government-licensed radio broadcaster, does not render constitutional a statute that seeks to restrict the speech of cablecasters. Cable television, however, is not subject to licensing by the FCC, is subscribed to by viewers precisely in order to obtain a greater variety of programming than is available from governmentally licensed broadcasters and is a medium whose defining characteristic is that it, unlike the broadcast media, can offer a literally infinite variety of programming choice. It thus defies both logic and precedent to conclude that the medium of cable television should be relegated to the lesser level of protection afforded to broadcasters in *Pacifica* when broadcasters are afforded that limited protection only because of the special characteristics of broadcasting.

But the statute at issue here does not even squarely pose that issue because it suffers from a more commonplace, but still constitutionally fatal, flaw. Regardless of the scope of *Pacifica*, the Utah statute is terminally vague. It offers no guidance as to applicable standards in an area where precision of regulation is required, a fact tacitly conceded by the Utah Attorney General's belated, non-binding and ultimately ineffective effort to provide some of the standards the statute itself lacks. As the Governor of Utah concluded in vetoing the legislation, the statutory definition of "indecent material" is "not the least bit predictable." Punitive fines or "forfeiture" may not be premised on such a foundation. This legislation has

been found unconstitutional by each of the four federal judges who has considered it and similar legislation has been struck down by the federal district and circuit courts in the Eleventh Circuit.

Further, the statute purports to punish speech when regulation of such speech is preempted by federal statute and for this reason as well the decision below should be affirmed.

No substantial question warranting plenary review need be resolved to dispose of this appeal.

ARGUMENT

THE ISSUES DISPOSITIVE OF THIS CASE DO NOT WARRANT PLENARY CONSIDERATION BY THIS COURT

A. THE UTAH CABLE DECENCY ACT IS VAGUE AND STANDARDLESS ON ITS FACE

Whatever else may be said of the Utah Cable Decency Act, the one thing that is clear is that it is woefully unclear. In an area of constitutional inquiry that demands exacting precision,[9] the statute is a textbook example of a law that fails adequately to describe that which it seeks to proscribe. *See Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 620 (1976); *Baggett* v. *Bullitt*, 377 U.S. 360, 371-73 (1964).

Judge Anderson held and the Court of Appeals unanimously agreed that this was one of several vices of the statute. In fact it was a basis of Judge Baldock's separate concurring opinion:

> Defining indecency with express reference to the "time, place, manner and context in which the material is presented," without more, would cause people of common intelligence to guess at the meaning of indecency and differ as to the law's application. *Connally* v. *General*

---

9 *See Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 682 (1968); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

> *Construction Co.*, 269 U.S. 385, 391 (1926). This uncertain meaning does not provide fair notice of what is proscribed, could result in arbitrary enforcement and could deter protected expression. *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). For these reasons I am compelled to agree with the result reached by the district court.

(J.S. App. 39a-40a; citation omitted)

The Attorney General's opinion is perhaps the best illustration of the statute's vagueness and of why, therefore, this case does not warrant plenary review. Asked his view, for example, as to the time of day when indecent programming could be shown, the Attorney General responded:

> In answering this question, I hasten to state the obvious: No public lawyer or judge can specify the precise hours of each 24-hour period when indecency may be lawfully shown under the Act without functioning to some extent as a legislature. This is obvious because the Legislature simply did not specify the precise hours in the Act.

(J.S. App. 109a-110a)

Nonetheless, the Attorney General pressed forward. Turning to this Court's decision in *FCC* v. *Pacifica Foundation*, *supra*, he noted Justice Powell's observation, in his concurring opinion, that the FCC's actions in that case did not prevent the broadcast of the monologue at issue "during late evening hours." (J.S. App. 111a) The Attorney General acknowledged that any specification of late evening hours "must contain an element of arbitrariness." (J.S. App. 113a) Inexplicably, however, he then concluded that, in his view, programming containing indecent material could safely be shown between the hours of midnight and seven a.m., a peculiar interpretation of "late evening," even if one were to ignore the admitted arbitrariness of the process in the first place.[10]

---

10 The Attorney General was also asked his view as to what constituted a "continuous course of conduct." (J.S. App. 113a) Noting that neither the

Its acknowledged "arbitrariness" aside, the very need for the Attorney General's opinion reflects a recognition of the total absence of standards in the statute. Consider the cable operator who consults with his counsel to determine whether and when he might disseminate the movie "Carnal Knowledge," one which contains occasional scenes of nudity and which has been held not to be obscene by this Court. *Jenkins* v. *Georgia*, 418 U.S. 153 (1974). "Carnal Knowledge" was, despite its inclusion of scenes which this Court characterized as involving "sexual conduct including 'ultimate sexual acts,' " 418 U.S. at 161, held to lack the "public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain" which the Court in *Miller* v. *California, supra*, 413 U.S. at 35, had held was an essential ingredient of obscene material. Utah's statute, however, bars not obscenity but indecency; it deliberately does *not* require the "public portrayal of hard core sexual conduct for its own sake" which *Miller* requires.[11] It thus leaves those who provide cable programming to guess as to the likely reaction of each of the more than 250 enforcing officers—and the juries they might empanel—as to whether the otherwise protected depictions in "Carnal Knowledge" comport with contemporary community standards for cable television in Utah, let alone at what time of day the showing of these scenes could be offered so as not to be "patently offensive for the time, place, manner and context" in which they were offered.

The standardlessness of the statute is particularly chilling with respect to efforts to plan nationwide programming such

---

case law nor the legislative history helped in determining "the frequency necessary to constitute a continuous course of conduct," the Attorney General suggested that if a cable system operator presented indecent material "at least three times within a ninety-day period," that would, in his view, constitute a "continuous course of conduct" for enforcement purposes. (J.S. App. 114a)

11 Utah has enacted an obscenity statute that comports with the standards set forth in *Miller*. Utah Code Ann. §§ 76-10-1201 to -1229 (1978 & Supp. 1983). *See Piepenburg* v. *Cutler*, 507 F. Supp. 1105 (D. Utah 1980), *aff'd*, 649 F.2d 783 (10th Cir. 1981).

as that provided by HBO. The net effect of Utah's law, if sustained, could be to burden national entities like HBO with choosing between reducing all their programming to that which is "safe" under Utah law or excluding Utah from their programming altogether. *See Capital Cities Cable, Inc.* v. *Crisp, supra*, 467 U.S. at 707-08.

It was the statute's vagueness, among other problems, that led Governor Matheson to veto the bill. In his message to the Legislature Governor Matheson concluded:

> The heart of S.B. 309 is the definition of indecent material, which is described in very general terms. What will be labeled "indecent," under this definition, is not the least bit predictable, but will depend entirely upon a case by case determination by separate juries in separate localities for each separate piece of challenged programming. With respect to the one piece of programming, not only could different results be reached in different areas, but, different results could be reached in the same area depending upon the time of day the program is aired. And the result, with respect to any one movie or program, will furnish no guidance as to what will happen to some other program when it is challenged.
>
> This lack of predictability seems designed to force cable casters to eliminate any programming that could, under any possible circumstances, be found to be "indecent." In my view, the inevitable effect would be the withdrawal from Utah cable TV of many first-run movies and other similar programming simply because cable casters will not risk the uncertainties of the statute's enforcement and application. The sort of material withdrawn could include movies such as the Academy Award winning movie *Kramer vs. Kramer*, which could be found indecent under S.B. 309. The same may be said of other similar worthwhile films.

Governor's Veto Message at 1-2.

The Attorney General's effort, through his opinion, to assuage concerns about the vagueness of the statute offers little solace—and not a bit of predictability—with respect to the statutory scope. According to his opinion:

> [The statute] does not aim to, and will not, prevent Utahns from viewing quality movies like *Kramer vs. Kramer* on the basis of the tastefully—or even distastefully—done scene or two which may offend some viewers.

(J.S. App. 125a) One may properly ask: Why? What statutory provision offers such protection? What is the protection it offers and how can it be applied to other possible programming? What is the standard that renders *Kramer vs. Kramer* nonactionable?[12] As this Court has held, even "[w]ell-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law." *Baggett v. Bullitt, supra*, at 373.

The district court concluded that the statute was impermissibly vague, as did every member of the panel below. The

---

12 Despite what the Jurisdictional Statement implies, the so-called "construction" suggested in the Attorney General's letter opining on the statute is not, under Utah law, binding on any official empowered to enforce it, as the text of the opinion itself makes clear. Nor does appellant cite any Utah authority for the proposition that the Attorney General's opinion binds any enforcement authority let alone each of the officers empowered to enforce the statute. *See* n.4, *supra*.

Indeed, Morality in Media, *amicus curiae* below, contended that the Attorney General lacked the authority to adopt the midnight to seven a.m. limitation even with respect to the enforcement policies of his own office, let alone to bind county or city attorneys to his views. Brief *Amicus Curiae* of Morality in Media, Inc., submitted to the United States Court of Appeals for the Tenth Circuit at 45-47.

The fact that more than 250 state, county and local officials are separately empowered to enforce the statute illustrates the potential havoc it could wreak and rebuts the suggestion in the Jurisdictional Statement that the statute here is just like the statute that empowered the Federal Communications Commission—a single administrative agency—to issue the declaratory ruling at issue in *FCC* v. *Pacifica Foundation, supra*. (Compare J.S. 21-22.) The inapplicability of *Pacifica* to the medium of cable television is discussed in Part B, *infra*.

Governor of Utah has eloquently articulated the statute's incurable lack of ascertainable standards of conduct. The Attorney General's opinion highlights the fact that the statute fails to give fair notice of what speech it seeks to prohibit. This issue alone is dispositive of this appeal and for this reason the appeal does not warrant this Court's plenary consideration.

B. THE UTAH CABLE DECENCY ACT IS, IN ANY EVENT, AN UNCONSTITUTIONAL RESTRICTION OF SPEECH

1. The Statute Impermissibly Restricts Speech Protected By the First Amendment

The vagueness of the statute aside, the ruling of the Court of Appeals should be affirmed because the statute is a direct and impermissible restriction of constitutionally protected speech. The issue has been addressed in four federal district court decisions,[13] by the Court of Appeals for the Tenth Circuit in this case and by the Court of Appeals for the Eleventh Circuit in *Cruz* v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985). Each concluded that there is no basis in law for abandoning the standards so carefully articulated by this Court in *Miller* v. *California*, *supra*. Each concluded that to abandon *Miller* in the context of a medium the very essence of which is individual choice is particularly offensive to First Amendment principles. Each rejected the argument so heavily relied on by appellant here that this Court's decision in *FCC* v. *Pacifica Foundation*, *supra*, can be read to authorize such a sweeping rejection of long-standing precedent.

In *Pacifica* this Court considered the question of whether the Federal Communications Commission constitutionally could issue a declaratory order sanctioning a radio licensee for

---

13 *See Cruz* v. *Ferre*, 571 F. Supp. 125 (S.D. Fla. 1983); *Community Television of Utah, Inc.* v. *Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc.* v. *Wilkinson*, 531 F. Supp. 987 (D. Utah 1982); and the district court's opinion in this case (J.S. App. 41a).

broadcasting an indecent comedy monologue at 2 o'clock in the afternoon. Emphasizing the narrowness of its holding (438 U.S. at 750), the Court concluded that the Commission's action was constitutionally permissible given the unique characteristics of the broadcast medium. *Pacifica* does not provide support for such far-reaching restrictions on First Amendment rights as those adopted by the Utah legislature. Indeed the "unique" characteristics of broadcasting identified by this Court in *Pacifica* find no parallel in the medium of cable television.

Citing to its decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), the Court in *Pacifica* stressed that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *FCC* v. *Pacifica Foundation, supra*, 438 U.S. at 748. The analytical foundation articulated by this Court for distinctions between broadcasters and other speakers was grounded in the fact that broadcasters make use of the scarce spectrum of public airwaves. *Red Lion Broadcasting Co.* v. *FCC, supra*. The same cannot be said of cable. *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 44-45 (D.C. Cir.) (*per curiam*), *cert. denied*, 434 U.S. 829 (1977).

Nonetheless, appellant ignores the fundamental distinctions between cable and broadcasting and urges, instead, that this Court's decision in *Pacifica* sanctions the sweeping regulation of the content of cable programming because cable, in appellant's view, is "pervasive." Passing the anomaly that such a theory proffers—*i.e.*, the more popular a medium is, the less constitutional protection it should receive—the argument distorts this Court's deliberately narrow ruling in *Pacifica*.

Cable television is, by its very nature, far less intrusive and uncontrollable than broadcasting. Broadcast programming is disseminated through the airwaves to be received, watched or heard by anyone at no cost. As one district court noted, broadcasting quite literally meets the definition of pervasiveness: it is "ever-present." *Community Television of Utah, Inc.*

v. *Roy City, supra*, 555 F. Supp. at 1169.[14] In contrast, cable television signals are sent through a system of privately-owned coaxial cables directly to only those television receivers that are physically connected to the system. As the Eleventh Circuit noted in *Cruz* v. *Ferre, supra*, "[o]ne of the keys to the very existence of cable television is the fact that cable programming is available only to those who have the cable attached to their television sets." 755 F.2d at 1420 (footnote omitted). Describing the various tiers of choice that face every cable subscriber, the court continued:

> The Cablevision subscriber must affirmatively elect to have cable service come into his home. Additionally, the subscriber must make the additional affirmative decision whether to purchase any "extra" programming services, such as HBO. The subscriber must make a monthly decision whether to continue to subscribe to cable, and if dissatisfied with the cable service, he may cancel his subscription. The Supreme Court's reference to "a nuisance rationale," [in *Pacifica*], *id.* at 750, 98 S. Ct. at 3041, is not applicable to the Cablevision system, where there is no possibility that a non-cable subscriber will be confronted with materials carried only on cable.

Id. In short, choice is what cable is all about. That is the essence and the attraction of the medium. To suggest that because many Utah citizens have chosen to invite cable into their homes makes it "pervasive" and hence subject to regulation on the basis of this Court's decision in *Pacifica* ignores not only the caveats contained in *Pacifica* itself but reality itself.[15]

---

14 The facts in *Pacifica* illustrate that one literally cannot get away from radio. Radio receivers are as portable as they are inescapable. The same can hardly be said of cable.

15 In his concurring opinion below, Judge Baldock concluded that even if this Court's decision in *Pacifica* could constitutionally be applied to the medium of cable programming, the Utah Cable Decency Act is unacceptable "because it is complete prohibition rather than regulation." (J.S. App. 39a)

The second interest identified by this Court in *Pacifica* as support for the FCC's action there was the unique accessibility of broadcast programs to children. Courts that have considered the issue raised here have recognized that government has a substantial interest in protecting the welfare of children. *Cruz* v. *Ferre, supra*, 755 F.2d at 1420; Opinion of the District Court, J.S. App. 72a. But those courts have, as well, rejected the sweeping conclusion urged by appellant that the interest in protecting children can justify the ban of indecent speech on cable television.

In sharp contrast to cases cited by appellant (*see, e.g., Bethel School District No. 403* v. *Fraser*, 106 S. Ct. 3159 (1986); *Board of Education* v. *Pico*, 457 U.S. 853 (1982); *Ginsberg* v. *New York*, 390 U.S. 629 (1968)),[16] the inevitable effect of the Utah Cable Decency Act is to "reduce the adult population [of Utah] to [watching] only what is fit for children," *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957). To suggest that this Court's decision in *Pacifica* permits such a result ignores this Court's recent and express admonitions that *Pacifica* is not to be so broadly construed and ignores again the fundamental distinctions between broadcast television and cable television. *See Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *see also Cruz* v. *Ferre, supra*, 755 F.2d at 1421.[17]

---

16 Each of the cases cited allowed restrictions on access of material to children without substantially burdening, let alone barring, consumption by adults. Here, in the asserted interest of protecting children, adults who go to sleep before midnight are, even under the Attorney General's view of the statute, wholly denied access to non-obscene material which may be of substantial literary or artistic merit and which, with respect to original HBO programming, for example, may be wholly unavailable through another source. *Compare FCC* v. *Pacifica Foundation, supra*, 438 U.S. at 750 n.28.

17 Apart from the cases involving statutes directed narrowly at the protection of children (discussed in text), appellant also asserts that the *Pacifica* rationale has been applied to sustain regulation in other contexts, citing to *City of Renton* v. *Playtime Theatres, Inc.*, 106 S. Ct. 925 (1986) and *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (J.S. 19 n.35). In each of these cases, however, the Court's decision turned on the fact that the regulation was directed not at speech, but at collateral *conduct*. No such claim can be made here.

The very nature of the cable medium makes it less suitable to government regulation than broadcast television. While it may be difficult in today's society to imagine a home without television, each parent (and non-parent) has the choice to purchase cable or not, to limit the purchase of additional services to such offerings as The Disney Channel, to purchase the full range of services, including HBO, or to cancel at any time. In addition, every cable operator in Utah is required under federal law to provide at modest cost a parental "lock-box"—a device capable of preventing access to cable channels —to any subscriber who wants one. Cable Policy Act § 624(d), 47 U.S.C. § 544(d). *See Cruz* v. *Ferre, supra*.

It was just these factors that led the Eleventh Circuit to hold in *Cruz* v. *Ferre*:

> This interest [in protecting children] is significantly weaker in the context of cable television [than in the context of broadcast television] because parental manageability of cable television greatly exceeds the ability to manage the broadcast media.

755 F.2d at 1420.

In *Bolger* v. *Youngs Drug Products Corp., supra*, this Court rejected an attempt, nearly identical to that which is urged here, to extend the rationale of *Pacifica* to other media. There this Court struck down a federal statute prohibiting the mailing to the home of unsolicited advertisements for contraceptives notwithstanding the government's asserted interest in protecting children.

> In *FCC* v. *Pacifica Foundation*, . . . this Court did recognize that the Government's interest in protecting the young justified special treatment of an afternoon broadcast heard by adults as well as children. At the same time, the majority "emphasize[d] the narrowness of our holding," . . . explaining that broadcasting is "*uniquely* pervasive" and that it is "*uniquely*" accessible to children, even those too young to read. . . . The receipt of mail is far less intrusive and uncontrollable.

463 U.S. at 74 (emphasis in original; footnote omitted).

The district and circuit courts have uniformly concluded that the medium of cable television is "far less intrusive and uncontrollable" than broadcast television and have rejected efforts to expand this Court's decision in *Pacifica* so as to abandon the long-standing principles articulated by this Court in *Miller* v. *California*. The decision of the court below is clearly correct and does not warrant plenary review.

2. The Courts Below Properly Resolved the Case on Cross-Motions for Summary Judgment

Appellant argues to this Court that the courts below erred in ruling on appellees' claim that the Utah Cable Decency Act was unconstitutional because the statute "has never been enforced in a concrete factual situation." (J.S. (i)) Yet the Attorney General has specifically and expressly acknowledged that the courts below should not have abstained from the exercise of federal jurisdiction in this case.[18] It is somewhat unclear exactly what appellant would have proposed that the lower courts do. What he would propose that this Court do, however, is made clear in the Jurisdictional Statement:

> In its current setting, there is only one issue in this case that federal courts have the unclouded power to decide. . . . The narrow question—indeed the only question—which can and should be decided at this time is whether, under *Pacifica*, the State of Utah has *any* constitutional authority to channel the cablecasting of indecent material so as to minimize its imposition on children and unwilling adult viewers.

J.S. 26-27 (emphasis in original). Thus, in an effort to persuade this Court of the importance of the issues raised on this appeal, appellant not only asks the Court to abstract from this case the broadest constitutional issue raised by the passage of the Cable Decency Act but to disregard the other necessarily attendant issues that make clear that this statute is infirm on

---

18 Brief of Appellant to the United States Court of Appeals for the Tenth Circuit at 16 n.15 ("We do not suggest in this appeal that abstention was required.").

narrower constitutional grounds. Such an argument turns Article III on its head.

Having suggested that this Court should, in essence, issue an advisory opinion as to whether this Court's decision in *Pacifica* should be applied to cable, appellant goes on to allude to case and controversy requirements, standing requirements and abstention principles while at the same time avoiding any suggestion that a case and controversy is absent here or that appellees lack standing or that the courts below should have abstained. The simple fact is that under this Court's long-standing precedents appellant cannot demonstrate that the factors that motivate federal courts to decline to exercise their jurisdiction on such grounds are present here.[19] Appellant's effort to intimate otherwise provides no basis for plenary review by this Court.

---

19 Appellant argues, for example, that "[t]he courts below have acted directly contrary to numerous decisions of this Court requiring that constitutional decisions be based upon concrete controversies and real fact. . . ." (J.S. 23) Yet there is simply no dispute that the cable distributor plaintiffs, for example, intend to engage in conduct, affected with a constitutional interest, but proscribed by the Utah Cable Decency Act and that there exists a credible threat that the Act will be enforced. *See, e.g., Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 298 (1979). With respect to appellee HBO there is also no dispute that its First Amendment interests are directly affected by the Act at the very least as a result of its ongoing business relationships with cable distributors in the State of Utah. *See, e.g., Secretary of State* v. *Joseph H. Munson Co.*, 467 U.S. 947 (1984). In any event, as Governor Matheson recognized, the statute's chilling effect is real and substantial. Governor's Veto Message at 2. Nor is there any question but that a real factual record exists, as is reflected in the cross-motions for summary judgment.

There is also no dispute that the cable viewer plaintiffs' interest in receiving cable programming to which they have chosen to subscribe satisfies the requirement that parties "assert [their] own legal rights and interests." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). This is not a case where appellees must rely on the "overbreadth" doctrine for standing; appellees challenge the statute in their *own* right. *Compare New York* v. *Ferber*, 458 U.S. 747, 767 (1982).

Finally, appellant's suggestion that the "course adopted below" impinges upon "the proper allocation of state and federal authority" so as to raise abstention concerns (J.S. at 24-25), ignores this Court's repeated cautions that abstention "is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it," *County of*

C. THE UTAH CABLE DECENCY ACT IS PREEMPTED BY THE CABLE COMMUNICATIONS POLICY ACT OF 1984

Not only is the Act incurably vague and otherwise impermissible under the First Amendment itself, but it is beyond the power of the State of Utah under the Supremacy clause. The courts below correctly determined that with the passage of the Cable Communications Policy Act of 1984, the efforts of the State of Utah to control the content of cable programming have been preempted by Congress. This issue alone is dispositive of this litigation and demonstrates why this case is not an appropriate vehicle for considering the broad constitutional questions appellant urges this Court to decide.[20]

Allegheny v. *Frank Mashuda Co.*, 360 U.S. 185, 188 (1959), and the equally well-established doctrine that abstention is completely inappropriate where, as here, a state statute is challenged on the ground that it is repugnant to the First Amendment. *Zwickler* v. *Koota*, 389 U.S. 241, 252 (1967). Appellant has not and cannot show that any of the "special circumstances" that might otherwise warrant abstention are present here. As discussed in Part A, *supra*, the statute is not readily susceptible of a narrowing construction, and certainly not one which would eliminate or substantially modify the federal constitutional questions. *See, e.g., Kusper* v. *Pontikes*, 414 U.S. 51 (1973).

20 Appellant also raises an issue unrelated to the constitutional issues he seeks to present for review by this Court, challenging the award of attorneys' fees under 42 U.S.C. § 1988 (1982). This issue is not itself an appropriate one for appeal under 28 U.S.C. § 1254(2) (1982). Nor is it an issue appropriate for review in the exercise of this Court's discretion. *See Davis* v. *Scherer*, 468 U.S. 183, 189-90 n.7 (1984). A prevailing plaintiff in a civil rights case should ordinarily recover attorneys' fees " 'unless special circumstances would render such an award unjust'." *Kentucky* v. *Graham*, 473 U.S. 159, 164 (1985); *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983), *quoting* S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976) ("Senate Report"), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5912, *quoting Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (*per curiam*). Appellant argues that the financial status of a plaintiff and the "good faith" of a defendant are sufficient "special circumstances" so as to justify denial of a fee award. To our knowledge, no circuit court has ever agreed.

(footnote continued on following page)

The Cable Policy Act provides that any state or local act or regulation "which is inconsistent with the provisions of [the Act] shall be deemed to be preempted and superseded" (Cable Policy Act § 636(c), 47 U.S.C. § 556(c)). As the district court correctly found, the Act makes clear that the federal government is to exercise "exclusive" regulatory power over program content in all but a few limited areas. (*Id.*) Section 624(f)(1) of the Act states:

> Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or con-

---

The courts of appeals have consistently rejected appellant's argument that the ability to pay attorneys' fees is relevant to the determination of whether a prevailing plaintiff seeking injunctive relief is entitled to an award of fees under section 1988. *E.g., American Booksellers Ass'n* v. *Commonwealth of Virginia*, 792 F.2d 1261, 1266-67 (4th Cir. 1986); Opinion of the Court of Appeals, J.S. App. 6a; *Duncan* v. *Poythress*, 777 F.2d 1508, 1511 (11th Cir. 1985), *cert. denied sub nom.*, 106 S. Ct. 1659 (1986); *Ackerley Communications, Inc.* v. *City of Salem*, 752 F.2d 1394, 1397 (9th Cir.), *cert. denied*, 105 S. Ct. 3503 (1985); *Milwe* v. *Cavuoto*, 653 F.2d 80, 83 (2d Cir. 1981); *International Oceanic Enterprises, Inc.* v. *Menton*, 614 F.2d 502, 503 (5th Cir. 1980). Appellant's impermissibly expansive reading of *Zarcone* v. *Perry*, 581 F.2d 1039 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1978), and *Wheatley* v. *Ford*, 679 F.2d 1037 (2d Cir. 1982), is misplaced, out of context and in any event irrelevant where, as here, injunctive relief rather than damages was sought. *See Zarcone* v. *Perry, supra*, 581 F.2d at 1044 (distinguishing situations involving injunctive relief). No circuit court, including the Second Circuit, has adopted the expansive extension of those opinions offered by appellant. *Cf. Milwe* v. *Cavuoto, supra.*

Similarly, the courts of appeals have uniformly concluded that the alleged "good faith" of a defendant in pursuing practices or enacting policies later held to be unconstitutional is entirely irrelevant to the question of whether fees should be awarded to a prevailing plaintiff under section 1988. *E.g., American Booksellers Ass'n* v. *Commonwealth of Virginia, supra*, 792 F.2d at 1266-67; *Martin* v. *Heckler*, 773 F.2d 1145, 1151 (11th Cir. 1985); *International Oceanic Enterprises, Inc.* v. *Menton, supra*, 614 F.2d at 504; *In re Kansas Congressional Districts Reapportionment Cases*, 745 F.2d 610 (10th Cir. 1984). Appellant cites no case law to the contrary and we are aware of none.

> tent of cable services, except as expressly provided in this subchapter.

47 U.S.C. § 544(f)(1). Because there is no express provision in the Cable Policy Act authorizing the states to regulate that which the State of Utah has regulated here, by the terms of the Cable Policy Act itself the Utah Cable Decency Act is preempted.

At the outset, it simply cannot be disputed that to the extent that the Utah Act regulates leased channels, public channels, educational channels and governmental channels (all of which it clearly does), the statute is flatly and expressly superseded by the Cable Policy Act. Sections 611(e) and 612(c) of the Act prohibit cable operators from asserting any editorial control over these so-called "special access" channels and section 638 forbids civil actions against cable operators concerning the content of such programming. 47 U.S.C. §§ 531(e), 532(c) and 558. (Opinion of the District Court, J.S. App. 47a-49a; Concurring Opinion of Baldock, J., J.S. App. 9a) The courts below have concluded that the Utah Cable Decency Act has been explicitly preempted in this regard and the Jurisdictional Statement does not appear to challenge this. Thus the Act is defective on this basis alone.

Similarly, the *effect* of allowing local regulation of so inchoate a concept of indecency has been plainly recognized by this Court in a pre-Cable Policy Act context. As this Court recognized in *Capital Cities Cable, Inc.* v. *Crisp, supra*, the effect of allowing a single state, let alone more than 200 jurisdictions within a state, to enforce a content restriction may be to force the elimination of such cable services altogether (467 U.S. at 707-08) or, perhaps, to alter the national presentation to conform to the Utah standard.[21] "As a consequence, the public may well be deprived of the wide variety of programming

---

21 The very imprecision (and potential inclusiveness) of indecency distinguishes it from the more rigorous and narrow context of obscenity, magnifying the impact of differing local standards in the indecency context.

options that cable systems make possible." *Id.* at 708. The federal cable legislation, expressly designed to "establish a national policy concerning cable communications," to "establish guidelines for the exercise of Federal, State and local authorities with respect to the regulation of cable systems" and to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public" does not support such a result. (Cable Policy Act § 601(1), (3), (4), 47 U.S.C. § 521(1), (3), (4))

The Federal law exempts from preemption civil or criminal liability for "libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws."[22] Appellant argued below that the phrase "other similar laws" reflected Congress' intention to permit states to regulate speech that is "indecent" but not obscene. But, as the district court correctly observed, "[t]he list in § 638 [47 U.S.C. § 558] is a classic collection of laws regulating expression which the Supreme Court has deemed unprotected by the First Amendment" and concluded that "the plain purpose of § 638 is to preserve federal, state and local regulation of *unprotected* expression in the areas noted." (J.S. App. 50a-51a; emphasis supplied) No court has ever held that indecent expression is unprotected by the First Amendment. *See FCC* v. *Pacifica Foundation, supra.* In fact, the legislative history of the Cable Policy Act confirms that Congress was acutely aware of the fact that indecent speech was not unprotected speech and, as

---

22 The provision in question provides:

> Nothing in this subchapter [V-A] shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 [Act § 612] of this title or under similar arrangements.

Cable Policy Act § 638, 47 U.S.C. § 558.

such, could not be regulated by the states. (H.R. Rep. No. 934, 98th Cong., 2d Sess. 69-70 (1984) ("House Report"), *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4706-07).[23] While Congress recognized the potential for change in constitutional law, including the law relating to indecency, its focus was on speech which, like "obscenity" or "fighting words," might ultimately be held to be "*unentitled* to constitutional protection." House Report at 95, *reprinted in* 1984 U.S. Code Cong. & Admin. News at 4732 (emphasis supplied). No one has ever suggested that by characterizing non-obscene speech as "indecent," it thereby becomes wholly "unentitled" to constitutional protection.[24]

In essence, to argue that the Cable Decency Act has not been preempted by Congress is to argue, in different words, that this Court's decision in *Pacifica* held that speech that is "indecent" but not obscene is wholly unprotected by the First Amendment. As Congress well understood, this Court's decision in *Pacifica* stands for nothing of the kind. As such, the Utah Cable Decency Act is plainly preempted.

---

23 That Congress intended to preempt the very sort of legislation enacted by Utah is also reflected in the provisions of the Cable Policy Act that require cable operators to provide "lockboxes" to subscribers who request them. (Cable Policy Act § 624(d) 47 U.S.C. § 544(d)) It provided alternative means—short of the censorship Utah would impose—to deal with the concern that apparently animated the Utah legislature, expressly referring to indecency in this context.

24 "Obscenity . . . simply is not constitutionally protected speech. By contrast, indecency is not, *per se*, without constitutional protection." C. Blakeley and A. Eisgrau, *Regulatory Redux: The FCC's Shifting Approach Towards Obscenity and Indecency*, 4 Communications Lawyer 6, 7 (Fall 1986).

CONCLUSION

Appellees respectfully submit that the questions necessary to the disposition of this case are so unsubstantial as not to need further argument, and appellees respectfully move the Court to affirm the judgment entered by the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

Of Counsel:

Dean Ringel
Susan Buckley
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)

George H. Shapiro
James P. Mercurio
Gerald E. Oberst, Jr.
ARENT, FOX, KINTNER,
PLOTKIN & KAHN

Donald B. Holbrook
LeGrand R. Curtis, Jr.
JONES, WALDO, HOLBROOK
& MCDONOUGH

John S. Redpath, Jr.
Harold E. Akselrad
Faith Wender
HOME BOX OFFICE, INC.

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record for Appellee Home Box Office, Inc.

BRYAN L. MCDOUGAL
Suite 712 Judge Building
Salt Lake City, Utah 84111
(801) 363-9500

Counsel of Record for Appellees Community Television of Utah Inc., et al.

PATRICIA A. O'RORKE
Suite 1250
50 South Main Street
Salt Lake City, Utah 84144
(801) 328-2200

Counsel of Record for Appellees Connie R. Jones, et al.

February 20, 1987